

STATE OF MICHIGAN
COURT OF APPEALS

THELMA REED,

Plaintiff-Appellee,

v

BOBBY JOE REED,

Defendant-Appellant.

UNPUBLISHED

January 22, 1999

No. 201470

Wayne Circuit Court

LC No. 95-533613 DO

Before: Hood, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right from a judgment of divorce. We affirm.

I

First, defendant argues that in distributing the marital assets, the trial court assigned disproportionate weight to fault. We disagree. When this Court reviews the distribution of property, it must first review the trial court's findings of fact for clear error. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). If the findings of fact are not clearly erroneous, we must decide whether the trial court's dispositive ruling was fair and equitable in light of the facts. The trial court's ruling should only be reversed if this Court is left with the firm conviction that the distribution was inequitable. *Sparks, supra* at 152; *Byington, supra* at 109.

The objective of a property division is to reach an equitable distribution of property in light of all the circumstances. *Lesko v Lesko*, 184 Mich App 395, 400; 457 NW2d 695 (1990). The division need not be equal, but it must be equitable. *Sparks, supra* at 159; *Lesko, supra* at 400. The court should consider the following factors:

(1) duration of the marriage, (2) contributions of the parties to the marital estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and

conduct of the parties, and (9) general principles of equity. [*Sparks, supra* at 159-160.]

There may be additional factors that are relevant to a particular case, however, and the determination of those relevant factors varies depending on the facts and circumstances of the case. *Sparks, supra* at 160.

Even though the trial court's opinion emphasizes defendant's fault in the breakup of the marriage, the trial court considered numerous factors other than fault when distributing the parties' property, including the health and past and potential earning capacity of the parties by noting that plaintiff had no source of income, was disabled, and had no skills or training. *Id.* at 159-160. Therefore, the trial court did not disproportionately distribute the parties' assets based on fault. Cf. *Sparks, supra* at 160.

II

Next, defendant argues that the trial court abused its discretion in denying his motion for a new trial because the complaint failed to adequately apprise defendant of plaintiff's claims against him. We disagree. We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Mahrle v Danke*, 216 Mich App 343, 351; 549 NW2d 56 (1996).

Defendant argues that he was prejudiced at trial because the complaint failed to provide notice that fault would be an issue at trial. MCR 2.111(B)(1) requires that a complaint contain specific allegations to reasonably inform the adverse party of the claims he will be called on to defend. Plaintiff's complaint stated that defendant committed fraud by claiming that he still lived in the marital home when he had not from 1986 through 1995 when she filed divorce, and that he often left plaintiff and his children hungry, destitute, and without utilities throughout the course of their marriage. We believe that these allegations placed defendant on reasonable notice regarding the issue of fault. Moreover, because defendant did not object below on the basis that fault was not an issue raised in the pleadings, the issue is not preserved on appeal, and defendant is deemed to have consented to the adjudication of fault. See generally *Grebner v Clinton Charter Township*, 216 Mich App 736, 744; 550 NW2d 265 (1996). Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also argues that the trial court erred in denying his motion for a new trial because the property distribution was unfair and inequitable. We disagree. The trial court's findings of fact with regard to the parties' income and liabilities, upon which the trial court based its property distribution, were not clearly erroneous. *Sparks, supra* at 151; *Byington, supra* at 109. The parties stipulated that the marital assets consisted of the marital home valued at \$35,000, defendant's pension, one income property that contained eight rental units, defendant's social security benefits, defendant's disability benefits, and defendant's personal injury judgment for \$175,000, of which he netted \$110,000.

In light of the facts and circumstances of this case, the trial court's distribution of the marital property was fair and equitable. According to the evidence adduced at trial, defendant had an income

of \$3,800 to \$4,500 per month considering his pension, disability benefits, social security, and rental income. In 1994, plaintiff earned \$3,123, and in 1995, plaintiff earned \$566.50.

Evidence was introduced and the parties stipulated that in 1990, defendant was injured in an automobile accident and received a \$175,000 settlement, netting approximately \$110,000. From the proceeds of his lawsuit, defendant purchased 7530-7540 Alaska, an eight unit residential apartment, valued at \$50,000 at the time of trial, for \$26,000 and spent \$30,000 on repairs. The trial court concluded that defendant received a substantial amount of rental income each month from the Alaska property. The court therefore ordered defendant to obtain financing on the Alaska property and pay plaintiff \$25,000 for her interest in the property before it awarded defendant all rental income from the property.

Plaintiff was awarded the marital home that was valued at \$35,000 and ordered to pay the balance of the mortgage as well as the taxes, maintenance, insurance and repairs. The mortgage was in defendant's name only and, at the time of trial, the mortgage payoff equaled \$10,411 and the monthly payment was \$326.72. In light of the facts adduced at trial, this Court is not left with a firm conviction that this ruling was inequitable,¹ particularly given that defendant had not spent a night in the marital home since 1989, that plaintiff paid \$3,000 in arrears on this mortgage from the \$18,000 damage award she received as a result of her 1987 car accident, and that plaintiff was ordered to pay the balance of the mortgage, taxes, maintenance, insurance and repairs on the marital home. See *Sparks, supra* at 152; *Byington, supra* at 109. The property distribution was therefore fair and equitable. As a result, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

III

Defendant argues that the trial court abused its discretion in awarding plaintiff attorney fees. We disagree. We review a trial court's grant of attorney fees for an abuse of discretion. *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995).

Attorney fees in a divorce action are awarded only as necessary to enable a party to prosecute or defend a suit. *Id.* Attorney fees may also be authorized when the requesting party has been forced to incur expenses as a result of the other party's unreasonable conduct in the course of litigation. A party should not be required to invade assets to satisfy attorney fees when the party is relying on the same assets for support. *Id.*

According to the evidence adduced at trial, defendant has an income of \$3,800 to \$4,500 per month. The plaintiff worked in 1994 and 1995, earning less in a year than defendant earned in a month. During the marriage, defendant did not want plaintiff to work, so plaintiff received ADC and federal assistance in order to care for her children. Plaintiff was awarded the marital home, \$25,000 from the Alaska property and alimony. She did not have a car at the time of trial, however, because plaintiff owed \$5,143 on two automobiles that were repossessed when she was unemployed. Plaintiff testified that she had only paid \$300 in attorney fees because she did not have any money. Accordingly, the trial court did not abuse its discretion in awarding plaintiff attorney fees in light of the great disparity in the parties' income. *Id.* at 298-299.

IV

Finally, defendant argues that the trial court abused its discretion when it awarded plaintiff alimony in the amount of \$2,000 per month. Again, we disagree. Our standard of review for an alimony award is the same as that for the division of property. *Burkey v Burkey*, 189 Mich App 72, 79; 471 NW2d 631 (1991).

Principles similar to those of property distribution apply in determining whether to award alimony. *Hanaway, supra* at 295. The main objective is to balance the incomes and needs of the parties in a way that would not impoverish either party. *Id.* The trial court should focus on the income-earning potential of the assets and should not evaluate a party's ability to provide self-support by including in the amount available for support the value of the assets themselves. *Id.* at 296.

In light of the facts and circumstances of this case, the trial court's award of alimony to plaintiff was fair and equitable. According to the evidence adduced at trial, defendant has a substantial monthly income while plaintiff is currently unemployed. Indeed, there is a great disparity in income between the parties. Defendant will receive the Alaska rental property after he reimburses plaintiff for her share of the property's value, or \$25,000. If defendant finances the Alaska property, he will be able to keep that property and continue to receive rental income and live in one of the units.

Although plaintiff was awarded the marital home, she was also ordered to pay the balance of the mortgage, taxes, maintenance, insurance and repairs, though she has no job and no car. The primary value of the marital home to plaintiff is in its present form and therefore it does not have income earning potential, nor does it eliminate her cash flow needs. *Magee v Magee*, 218 Mich App 158, 164; 553 NW2d 363 (1996); *Hanaway, supra* at 296. At trial, plaintiff was fifty-two years old, unskilled and disabled. Plaintiff did not work outside of the home for any length of time during the marriage because defendant did not want her to work. Indeed, plaintiff's lack of employment skills makes it unlikely that she would find employment that would provide a sufficient income to maintain her modest lifestyle. *Magee, supra* at 163. Plaintiff applied for social security benefits, but her application was denied. In 1987, plaintiff was injured in an automobile accident for which she received \$18,000 in damages; she was also injured in a subsequent car accident, but that litigation was pending at the time of trial. Because of plaintiff's sporadic work history, her belated entry into the workforce, and no government assistance, it is unlikely that she would have sufficient income to support herself. *Id.*

We believe that the trial court's award of alimony effectively balanced the incomes and needs of the parties in a way that would not impoverish either party. *Hanaway, supra* at 295.

Accordingly, the trial court's dispositional ruling concerning the award of alimony was equitable. Cf. *Magee, supra* at 164.

We affirm.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Jane E. Markey

¹ Also, notably, the trial court did not order either plaintiff or defendant to split their respective damages awards from their separate automobile accidents, i.e., defendant had received \$110,000 and plaintiff received \$18,000.